

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the testimony given at the preliminary hearing, together with the exhibits admitted into evidence and the briefs of the parties the Appeals Board finds for purposes of preliminary hearing that the Order of the Administrative Law Judge should be affirmed.

There is scant medical evidence in the record concerning causation. The only medical opinion relating claimant's condition to her employment is in the September 21, 1995 progress notes of Dr. Patel. Although he has the wrong date of accident, Dr. Patel describes the pain as having started while wiping glass off at work. His diagnosis was of a sprained shoulder. Claimant underwent surgery December 21, 1995 to remove a mass in her right elbow. It is not clear from the evidence how this condition would manifest itself as pain and swelling in the shoulder and upper arm. Claimant describes the mass as causing an impingement of the nerve which passes through the shoulder. Dr. Howell's records appear to support claimant's contention in this regard. Furthermore, there is no medical evidence to the contrary.

The claimant, the claimant's daughter (Rosemary Neal) and the claimant's supervisor (Staci Crews) each testified at the preliminary hearing. Claimant states that at approximately 1:15 p.m. or 1:30 p.m. the afternoon of September 5, 1995, she was cleaning the glass over the steam table when her right arm and shoulder started hurting. Her shift ended at 2 p.m. and by the time she arrived home the upper arm and shoulder area was swollen. Her pain worsened that evening and during the night, preventing claimant from sleeping. At approximately 4 a.m. the next morning claimant was taken to the emergency room of the local hospital.

The testimony of claimant's daughter is consistent with that of the claimant. Rosemary Neal was there when her mother arrived home from work on September 5, 1995. Ms. Neal noted that claimant's arm was swollen and that she was in discomfort. Claimant's pain worsened to the point where she asked Ms. Neal to take her to the emergency room. According to Ms. Neal, claimant said that she injured her arm at work cleaning the sneeze glass.

Respondent points to certain inconsistencies in the record in support of its position that the accident is not work related. Respondent contends that claimant was injured at home. The primary evidence in this regard is the hospital emergency room record. It does not mention a work-related injury. The Nurses Assessment notes that claimant stated "'I know my arm is broke.' Was sitting on sofa + [and] swung arms to get ↑ [up] + [and] felt arm `give.'"

Claimant contends that she described her condition as work related to the emergency room staff. She does not recall anything about an incident involving her getting up from the sofa.

The notice issue involves other contradictions in the record. Claimant's daughter testified that she telephoned claimant's supervisor, Staci Crews, from the hospital and recalls she specifically related to Ms. Crews how the injury occurred at work the day before when cleaning the sneeze glass. Ms. Crews acknowledges that she received a telephone call from claimant's daughter during the early morning of September 6, 1995 but denies there being any mention of claimant's condition being work related.

There is another contradiction in the testimony between claimant and Ms. Crews. Claimant testified that she did not report her injury on the day it happened because her supervisor was not present. Ms. Crews disputes this and says not only was she present but that she saw claimant retrieve claimant's purse at the end of claimant's shift and knows that claimant saw her.

Due to the conflicting testimony, the credibility of the witnesses becomes an important consideration. The Administrative Law Judge apparently found claimant and her daughter to be credible witnesses because he awarded benefits based upon their testimony. In weighing the evidence and considering the credibility of the witnesses, the Appeals Board takes into consideration the Administrative Law Judge's opportunity to observe the witnesses testify. He, therefore, had a unique opportunity to judge their demeanor and assess their credibility. Accordingly, the Appeals Board takes into consideration the Administrative Law Judge's findings in this regard. Giving some deference to the conclusions of the Administrative Law Judge and based upon our review of the record as a whole, the Appeals Board finds the preponderance of the evidence supports a conclusion claimant's injury did arise out of and in the course of her employment and that notice thereof was timely given.

The final issue raised by respondent concerns the award of temporary total disability compensation commencing with a date which precedes the filing of claimant's Application for Preliminary Hearing. Respondent points to the requirement in K.A.R. 51-3-5a that such an award should not be entered "except in highly unusual circumstances." Respondent contends that "highly unusual circumstances" have not been established and, therefore, the Administrative Law Judge exceeded his jurisdiction in ordering those temporary total disability benefits which predate the filing of the Application for Preliminary Hearing. The Appeals Board finds that the Administrative Law Judge did not exceed his jurisdiction in ordering these benefits. The date temporary total disability compensation should be commenced is a matter for determination by an administrative law judge at a preliminary hearing. See K.S.A. 44-534a, as amended by S.B. 649 (1996). Accordingly, the Appeals Board does not have jurisdiction to review that issue at this stage of the proceedings.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark dated April 23, 1996, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1996.

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BOARD MEMBER

c: Gregory Barker, Wichita, KS  
Kim R. Martens, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director